Supreme Court, U.S.
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No. 98-1190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WISCONSIN CENTRAL LIMITED,

Petitioner,

v.

BALTIMORE AND OHIO CHICAGO, TERMINAL RAILROAD COMPANY,

Respondent,

and

CSX TRANSPORTATION INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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This reply brief is submitted on behalf of petitioner Wisconsin Central Ltd. ("WCL"). Its purpose is to respond briefly to three arguments made in the brief opposing WCL's Petition filed by respondents (referred to as "BOCT").

1. BOCT claims that this case presents no issue of sufficient importance to warrant exercise by the Court of its certiorari jurisdiction. BOCT contends that the Seventh Circuit did not deviate from this Court's prior decisions uniformly holding that equitable defenses such as waiver cannot be used to avoid application of the filed rate doctrine. BOCT claims that the Seventh Circuit merely recognized an already established difference between a procedural waiver and a substantive waiver. BOCT brief at 7-8. Further, BOCT contends that this case is very fact intensive, involving issues not likely to ever arise again, thereby making it an inappropriate case for the exercise of certiorari jurisdiction. BOCT brief at 13. These arguments are completely wide of the mark.

First, BOCT cites no authority to support its claim of a well-recognized distinction between procedural waiver and substantive waiver, *i.e.*, that a procedural waiver will defeat application of the filed rate doctrine even though a substantive waiver will not. This Court has never endorsed such a distinction and, as pointed out in WCL's Petition, lower courts and the ICC have expressly rejected it. WCL's Petition at 14-15. Only in the instant case has the Seventh Circuit created this novel judicial exception to the filed rate doctrine. By contrast, this Court has consistently said, without exception, that equitable defenses, including waiver, cannot be used to defeat application of the filed rate doctrine. *See, e.g., Maislin Ind. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990) ("this Court has read the statute to create strict filed rate requirements and to forbid equitable defenses"). It may well be, as BOCT would undoubtedly urge, that the Court might wish to reconsider whether in some circumstances waiver

is now a defense to a filed rate doctrine claim. If that is the case, then that is all the more reason why the Court should grant WCL's Petition.

Finally, while this case has a lengthy and complex procedural history, the basic issue presented by WCL's Petition is not procedurally complex nor is it in any way fact intensive. The issue is a simple question of law: will the Court allow the Seventh Circuit to create an exception to the Court's uniform and consistent decisions holding that equitable defenses such as waiver cannot be used to defeat application of the filed rate doctrine. There are no unique or complex factual matters that need to be addressed to decide that issue. Given the continuing vitality of the filed rate doctrine as a regulatory cornerstone in several key industries, it is an issue of sufficient, on-going national importance to warrant exercise of the Court's certiorari jurisdiction.

2. BOCT claims that the Court need not address WCL's public policy argument (based upon this Court's decisions holding that a court must decide whether enforcement of an arbitration award would violate public policy) since enforcement of the award in this case would not violate any public policy.[1] BOCT's argument is based upon the premise that because the parties' interchange agreement incorporated BOCT's tariff rate, BOCT could

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[1] BOCT also complains that WCL's argument was not raised below, implying that WCL is thereby precluded from making the argument to this Court. BOCT brief at 8. WCL's public policy argument, however, is just that—an argument; it is not a new claim, and WCL is entitled to present any argument it has to support its claim (that under federal law it was entitled to have the district court decide its filed rate doctrine claim on the merits), irrespective of whether the argument was presented below. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

recover only the rate specified in its tariff, thereby insuring compliance with the public policy of the filed rate doctrine.

There are two serious problems with this argument. First, the argument is based upon a conclusion concerning the *merits* of WCL's filed rate doctrine claim. Neither the Seventh Circuit nor the district court, though, ever reached the merits of that claim because each found that WCL had waived its right to have the merits decided. Since the merits of WCL's claim were never addressed by the lower courts, it would be inappropriate to rule on WCL's Petition by reaching the merits. *Matsushita Elec. Ind. Co. v. Epstein*, 516 U.S. 367, 379, n.5 (1996).

More importantly, BOCT's contention is substantively wrong. Under the filed rate doctrine: "The rights [of a carrier], as defined by the tariff, cannot be varied or enlarged by either contract or tort . . . ." *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922). Yet, that is precisely what BOCT attempted to do in this case by seeking to recover the disputed charges under the interchange agreement, instead of its tariff. BOCT's right of recovery under its tariff was subject to a three-year statute of limitations, 49 U.S.C. § 11706, while its claim under the interchange agreement was subject to a ten-year limitations period, 735 ILCS 5/13-206. By seeking to recover under the agreement, BOCT, thus, sought to use a contract to enlarge its tariff rights, which is exactly what the filed rate doctrine prohibits. Because of the difference in the applicable statutes of limitations, BOCT's recovery under its tariff would have been far less than its recovery under the interchange agreement, something which, contrary to what BOCT contends in its brief, the Seventh Circuit expressly recognized. Appendix to Petition ("App.") 2a-3a.[2]

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[2] In its brief, BOCT claims that WCL never raised the three-year statute of limitations of 49 U.S.C. § 11706 as a defense, either

(continued...)

In any event, the issue before the Court is not the merits of WCL's filed rate doctrine claim. The issue is whether the Seventh Circuit erred in ignoring this Court's consistent decisions holding that a public policy defense to enforcement of an arbitration award, such as WCL's filed rate doctrine claim, is for a court to decide.

3. BOCT's argument that the former ICC regulation at 49 C.F.R. § 1030.1(a) renders the filed rate doctrine inapplicable to intermediate switching arrangements between carriers (BOCT brief at 11-12) has been expressly rejected. *Cincinnati, N.O. & T.P. Ry. Co. v. Chesapeake & O. Ry. Co.*, 441 F.2d 483, 487-488 (4th Cir. 1971); *see also Illinois Term. R. Co. Abandonment*, 328 I.C.C. 49 (1965), *aff'd*, 328 I.C.C. 66 (1966). Both of these cases were cited in WCL's Petition, and both go unmentioned in BOCT's brief.

Any lingering notion that the ICC through its rule-making authority could dispense with the filed rate doctrine was firmly laid to rest by this Court's decision in *Maislin*, 497 U.S. 116 (1990) (rejecting carefully crafted set of ICC-adopted rules intended to mitigate harsh and inequitable results of filed rate doctrine). The Court made it clear that it was up to Congress, not the ICC, to decide whether to modify the requirements of the doctrine. And in any event, BOCT's contention again goes to the merits of WCL's filed rate doctrine claim, which were never

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[2] (...continued)
before the district court or the arbitration panel. BOCT brief at 10, n.2. That is not true. WCL pled that statute of limitations as a defense in its very first pleading in the district court, its answer to BOCT's complaint. Record ("R.") 3. It is true that WCL did not plead the three-year statute as a defense to BOCT's claim under the interchange agreement, but there was no reason to do so since that statute applies to tariff claims, not breach of contract claims. Indeed, as pointed out in the text, it is the difference between the applicable statutes of limitations that shows why WCL's filed rate doctrine claim is in no way futile, as suggested by BOCT.

reached by the lower courts. As noted above, it would be inappropriate to deny WCL's Petition based upon an issue that was not decided below.

CONCLUSION

For the reasons set forth herein, as well as in the Petition itself, WCL's Petition should be granted, and the Court should set the case for briefing and argument.

March 1, 1999

Respectfully submitted,

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